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THE CANADIAN-AMERICAN FISHERIES.

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THE CANADIAN-AMERICAN FISHERIES.

Difficulties have arisen from time to time ever since the beginning of this century, relative to the fisheries about British North America. The Government of the United States has at all times appreciated the great value of those fisheries and has endeavored from time to time to enlarge the rights and privileges of American fishermen in the waters adjoining that country. The course pursued by the United States in this matter furnishes another instance of their efforts to secure new and valuable concessions from other governments to the welfare and prosperity of the American people.

The enormous value of a right to participate in fishing in the waters adjoining the British Colonies has justified the American Government in making every honorable effort to secure that right. During the time when the population of the United States was comparatively small, notably before the revolution, the waters off the Atlantic coast of that country were amply sufficient to supply the demand; but, with the great growth of the population and the decrease in the supply, the American fishermen were compelled to seek new fishing grounds, which they found in the waters adjoining what is now the Dominion of Canada. These grounds, so long as they are affected, as they now are, by the currents from the north, replete as at present with food suitable for fish, must remain most prolific. About six hundred American vessels annually engage in the mackerel fishing in Canadian waters, and the number of the vessels is rapidly increasing. Each of these vessels takes on an average not less than two hundred barrels of mackerel of the value of about ten dollars per barrel. The importation of fish to the New England States has assumed very large proportions and is of immense value to New England fishermen who see loss of occupation and livelihood in case Canada cannot be induced to allow them to continue as they have hitherto done under treaties, now expired.

On the other hand, the value of the fisheries in question are of great importance to Canada, and there seems to be a strong inclination in that country to protect what she may deem her rights in the matter. She feels, it would appear, that that source of wealth which nature has so lavishly given her should be harvested for her benefit and not that of another government. It is estimated that the value of the fisheries to Canada in 1884 was about $15,000,000, employing about 60,000 men and 23,000 boats. These figures are, of course, exclusive of Newfoundland, which is not a part of the Dominion of Canada.

With some idea of the attractiveness of the fisheries off the shores of the Dominion both to its own people and to the people of the United States, it will be well to ascertain if possible, what are the legal claims of each to the waters in dispute.

When British North America and the United States were colonies of Great Britain the rights to fish were common to both. When Great Britain formally acknowledged the independence of the colonies, the United States obtained "the liberty" to take fish on the coasts of Newfoundland, but not to dry or cure the same there. They were also granted "the liberty" of taking and curing fish on the coasts and in the bays and creeks of all British possessions in North America *as long as the same remained unsettled.* Their right "to enjoy unmolested the fisheries on the banks of Newfoundland and at all other places on the deep sea where the inhabitants of both countries used at any time previously to fish" was explicitly acknowledged in the third article of the same treaty, which was signed at Paris on September 3, 1783. During the years which elapsed between the signing of this treaty and the breaking out of the war of 1812 the British population increased along the shores of the bays and creeks of Nova Scotia and New Brunswick, and their interest in the fisheries, enjoyed in common with the Americans, became very much greater. When the war came to a close the question of the fisheries was revived and Great Britain considered *that any "liberty" formerly extended to the United States had naturally terminated, and refused to grant to the Americans "gratuitously" the privileges they formerly enjoyed of "fishing within the limits of British territory or of using the shores of the British territories for purposes connected with the fisheries."* At the same time they refused to consider the claim set up by the United States Government, of "*an immemorial and prescriptive right to the fisheries,*" claiming *that any rights enjoyed by the people of the old colonies in common with other British subjects ceased in those countries or waters which were still British possessions when the former became independent.* When no understanding could be

reached during the negotiations which ended with the Treaty of Ghent in 1814, Great Britain instructed the officers of her fleet stationed in British American waters not to interfere with American vessels on the Newfoundland banks, or in the Gulf of St. Lawrence, or on the high seas, but to exclude them from the harbors, bays and creeks of all His Majesty's possessions. Several American vessels were subsequently captured for trespassing in British waters, and the Government of the United States at last came to an amicable arrangement on a question which might at any moment lead to a serious international difficulty. The issue was the treaty signed by England and the United States on October 20, 1818, in which the rights of these two nations were clearly defined. By the *first* article of that treaty it was agreed that the inhabitants of the United States should have forever, in common with British subjects, the liberty to take and cure fish *on certain parts of Newfoundland and Labrador, and on the coasts of the Magdalen Islands*, under a few restrictions, on which it is not necessary to dwell, since no serious differences have arisen on the subject. In the same article the United States "*renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors*" of the British dominions in America not included within the limits just mentioned. At the same time American fishermen were to be permitted "*to enter such bays and harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, of obtaining water, and for no other purpose whatever.*

The whole controversy in past years between Great Britain (representing the Dominion of Canada and Newfoundland) and the United States has turned upon the true effect of the renunciation on the part of the latter "of any liberty heretofore enjoyed to take, dry and cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors" of British North America. In order to understand the importance of this point—which is in effect the fishery question constantly cropping up when all temporary arrangements like the Washington Treaty of 1871 cease between Canada and the United States—it is necessary to study the natural configuration of the eastern or maritime provinces of British North America. Looking at the map, we find first of all the large island of Newfoundland standing at the approaches of the Gulf of St. Lawrence. The French and Americans have free access, as a matter of right, to the Grand and other banks, and certain privileges of catching and curing fish on the coasts. American fishermen frequent the Grand Banks and come at times into the bays and harbors for repairs and bait; and the only important ques-

tion that has arisen with respect to Newfoundland is the value of these privileges within her territorial limits. Leaving Newfoundland, we come to the fishing grounds much frequented by the Americans for the mackerel, herring and other fisheries. We see the island of Cape Breton, separated from the mainland of Nova Scotia by a narrow strait known as the Gut of Canseau. This passage, whose average breadth does not exceed two and a half miles, takes us into the Straits of Northumberland, which lie between Nova Scotia and Prince Edward Island. We are now in the Gulf of St. Lawrence; in the middle of this gulf are the Magdalen Islands, the home of Canadian fishermen. The coast of New Brunswick, which forms the western boundary of the gulf, is indented by several bays, one of which—the Bay des Chaleurs, is one of the most prolific fishing grounds of the continent. In this bay, and on the coasts of Cape Breton and Prince Edward Island, the American fishermen during this century have dragged up fish to an enormous value. But leaving the Gulf of St. Lawrence and passing around the southern coast of Nova Scotia we come to the Bay of Fundy, bounded on the north by the province of New Brunswick, and having a small portion of the United States territory opposite to its southern headland. All the valuable fish to be caught in North America frequent this bay and the waters of the Gulf of St. Lawrence. These are the great fishing grounds so long envied by the fishermen of New England.

Now, it is admitted that the largest quantities of fish are found within three marine miles from the coasts and bays of the maritime provinces. Great Britain has always maintained that the *three marine miles* from the coasts, bays and creeks of her possessions *must be measured from the headlands or entrance of such classes of indents.* But this assertion of the territorial and maritime jurisdiction of the Dominion of Canada, as a section of the British Empire, is not admitted by the United States, and they have heretofore raised the issue, that the line of demarcation between exclusive and common water should not be measured from the headlands of bays, but should follow the shores of those indents as if they were sinuosities of the coasts. If their contention is founded on some principles of international law, or sustained by authority, then it would be difficult to exclude them from the most important fishing grounds of America. Wheaton states the rule as follows: "The maritime territory of every State extends to the ports, harbors, bays, mouth of rivers and adjacent parts of the sea inclosed by headlands belonging to the same State." Chancellor Kent admits that bays like Delaware Bay, which may be compared in many respects to Bay des Chaleurs, is wholly

within the territorial jurisdiction of the United States, and that this jurisdiction extends for three miles seaward from its headlands, Capes May and Henlopen. The same rule applies to Chesapeake and Massachusetts Bays, which are also inlets of large size.

Daniel Webster admitted, when the question came under his notice in 1852, that the claim of England to draw a line *from headland to headland*, and to capture all American fishermen who might follow their pursuits inside of that line, was well founded, and that "it was undoubtedly an oversight in the Convention of 1818 to make so large a concession to England. If we look at the first article of this Convention, we find that the United States *hereby renounce forever any liberty heretofore enjoyed or claimed" by their people in British waters.* In the Franconian case, which came before the British Courts in 1876, the question involved was whether or not a foreigner commanding a foreign vessel could legally be convicted of manslaughter committed whilst sailing by the external coast of England, within three miles from the shore, in the prosecution of a voyage from one foreign port to another. The Court, by a majority of seven judges to six, held the conviction bad on the ground that the jurisdiction of the Common Law Courts extended only to offenses committed within the realm, and that at common law such realm did not extend on the external coasts beyond low water mark. None of the Judges, however, doubted that Parliament had power to extend the laws of the realm to a zone of three miles around the outer coast, if it saw fit to do so. The Lord Chief Justice of England, by whose casting judgment the conviction was quashed, stated, "If an offense was committed" he said, "in a bay, gulf or estuary, *inter fauces terræ*, the common law would deal with it because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties." In another case, which was decided by the Judicial Committee of the Privy Council, in 1877, the question arose between two telegraph companies, whether Conception Bay in Newfoundland (which is rather more than twenty miles wide at its mouth and runs inland between forty and fifty miles) was within British waters or a part of the high seas. One of the companies laid a cable and buoys within the bay at a distance of more than three miles from the shore, and the rival company contended that the former had infringed rights granted to them by the Legislature of Newfoundland. The Judicial Committee held that Conception Bay was within territorial dominion of Great Britain. The Canadians claim that all bodies of water or inlets *inter fauces terræ*, being then within the territorial jurisdiction of England and her dependencies, it follows that when the Americans, by the

Convention of 1818, *explicitly renounced all liberty previously enjoyed to fish "on or within three marine miles of any of the coasts, bays, creeks or harbors of his Britannic Majesty's dominions,"* they gave up any claims they may previously have had, and confined themselves to the waters a league distant from those indents measured from headland to headland. The British Government, however, as alleged by Canadians, in its desire to afford every facility to the United States consistent with their sovereign rights and the interests of the people of British North America, have since 1845 thought it expedient to relax, in the case of the Bay of Fundy, the application of the rule to which they have generally adhered. They have permitted American fishermen to pursue their calling in any part of the bay, *provided they should not approach, except in cases specified by the treaty of 1818, within three miles of the entrance of any bay on the coast of Nova Scotia or New Brunswick.* While maintaining, as a matter of strict construction, that this large bay is rightfully claimed by Great Britain as a body of water within the meaning of the Convention of 1818, they have considered that in one respect this inlet could be treated exceptionally, inasmuch as there was some plausibility in the reasoning of the United States, that the headlands were not only sixty miles apart, but one of them was not British; and that, as pointed out by Mr. Everett to Lord Aberdeen in 1844: "*Owing to the peculiar configuration of the coasts of this arm of the sea, there is a succession of bays indenting the shores both of Nova Scotia and New Brunswick, within any distance not less than three miles, from which American fishermen were necessarily excluded by holding the whole body of water to be in the British territorial limits.*" The same argument could not be used in the case of the Bay of Chaleurs or other important indents of the coasts.

The imperial authorities have on many occasions strictly maintained the rights they possess under the law of nations. From 1818 to 1854 the British cruisers detailed by the Imperial and Colonial Government for the protection of their fisheries captured and confiscated several American vessels that were found ranging at points varying from quite near the shore to a distance of upwards of ten miles from land, on the ground that they were within the headlands of bays. In 1854, after considerable negotiation for years, the two Governments arranged a Reciprocity Treaty, which *temporarily* settled the increasing difficulties on the question. By this treaty the United States obtained free access to the fishing grounds on the east coast of British North America, and certain natural products of these two countries, like fish, coal, flour, meal, lumber and salt, were allowed to enter into each free of duty. This arrangement was of undoubted

advantage to both countries from a purely commercial point of view. Not only did it settle for the moment an ever-present cause of irritation, but it opened a large and increasing market to the export trade of British North America, while the Americans were able to prosecute one of their great industries at a decided advantage, and at the same time obtain additional buyers for their flour, corn, meal and manufactured goods. The Americans, by their greater enterprise and the superiority of their vessels, practically beat the British American fishermen in their own waters, and derived advantages, it was claimed, beyond any granted by the United States. In those days the provinces were isolated from each other, and a commercial or political union between them seemed still far off. In the absence of such a union, the people were not animated by a national feeling, but some of them began to consider whether a closer connection with the United States was not among the probabilities of the future. Manufactures were brought in large quantities from the United States in return for the natural products sent them by the provinces, and there was no prospect of the growth of a native manufacturing industry to add to the wealth and give additional employment to the people, large numbers of whom were annually leaving the country for the manufacturing districts of New England. Whilst the treaty lasted the balance of trade with respect to manufactured goods, amounted to £18,000,000 sterling in favor of the United States. The treaty came to an end in 1865 *by the action of the Washington Government.*

In the meantime, while the people of the provinces were endeavoring to consolidate their Government and establish a federation on a sound basis, they found themselves again threatened with the fishery question. The Convention of 1818 was again in force, and the fishermen of New England were alleged to be once more ranging in their waters. The efforts of the two governments to bring about a satisfactory commercial arrangement were entirely unsuccessful. The question then constantly pressed itself upon them how best to meet the difficulty of maintaining their rights without bringing about any serious international complication. The correspondence between England and Canada, as it appears in the Canadian Blue Books, from 1867 to 1871, is not very flattering to the national vanity of those Englishmen who believe there are times when a little firmness is necessary in the maintenance of undoubted Imperial rights. All the despatches of the British Government are in the direction of conciliating the United States in every way possible, until at last it was pointed out in one Canadian Minute of Council that "the course suggested (the freedom of the fisheries for another year) would certainly be regarded by the Amer-

ican people as an evidence of weakness on the part of Great Britain, and of an indisposition to maintain the rights of the colonies." The answers of the Canadian Government to the despatches from the imperial authorities are distinguished throughout by an assertion of the rights and interests of Canada. Concession after concession was made to the United States, until at one time it did look, as Mr. Mitchell, the Minister of Marine and Fisheries, pointed out to his colleagues, there was every danger that "the hesitation on the part of England to assert an undoubted national right would be misconstrued and be made the ground for other and more serious exactions, until such a point is reached that neither country can recede from with honor." However, the Canadian Government acquiesced in the suggestion of Her Majesty's Ministers at the very outset, and adopted the temporary expedient of issuing season licenses to American fishing vessels, at a nominal tonnage rate, "so as formally to preserve the right of sovereignty without occasioning any dangerous complications, such as were apprehended by the imperial authorities." American fishermen were restrained at first to bays under ten geographical miles, and subsequently to those only under six miles in width—a concession entirely in accord with the demands of the United States before and since 1854. During the four years this system remained in force it was evaded, and at last became practically worthless. In the first year of its existence 354 licenses were taken out, but they dropped to 25 in 1869. Vice-Admiral Wellesley, then in command of the North American fleet, considered it his duty to point out to the Secretary of the Admiralty that, "as a consequence of the continued indulgence towards the Americans, very few colonial fishermen are engaged in fishing, owing to the tariff imposed by the United States on fish imported in colonial vessels, and colonial fishermen, therefore, in considerable numbers, man American vessels." The government of Canada, led then, as now, by Sir John Macdonald, felt called upon to state that they viewed "*with very serious concern the effect upon our maritime population of such dependence upon American employers. It creates sympathy with foreign sentiments and institutions, and affords opportunities for instilling into the minds of our people ideas and expectations altogether inimical to British connection. There is actually presented to them the example of subjects of a republican power and citizens of a foreign State prosecuting their calling at the very doors and in the exclusive limits of British subjects in Canada, who are themselves shut out of the markets of that country by a prohibitive tariff, adopted in the interest of their own fishermen, while ours cannot even enjoy their own exclusive privileges. The influence of these*

considerations cannot be otherwise than seductive of the loyal attachment and personal enterprise of our seaboard population. It discourages the independent employment of Canadian fishing craft and provincial fishermen. It tempts our fishermen to catch and sell their fish clandestinely to owners of American vessels, who can afterwards market them in the United States, free of duty, as American-caught fish. This practice demoralizes our population and accustoms them to violations of our own laws.

Finally, the imperial authorities arranged with the administration at Washington the appointment of a joint British and American Commission, "*to treat of and discuss the mode of settling the different questions which have arisen out of the fisheries, as well as those which affect the relations of the United States towards Her Majesty's possessions in North America.*" The history of this Commission is well known. The American Commissioners refused to consider a new reciprocity treaty, and it was at last decided to admit the United States to the inshore sea fisheries of British North America, on condition that Canadian fish and fish-oil were admitted free of duty into the American market, and that Commissioners be appointed to determine the amount of any compensation which in their opinion ought to be paid by the Government of the United States in return for the privileges accorded to their citizens under the treaty. The Commission met at Halifax in the summer of 1877. The three Commissioners, M. Maurice Delfosse, Belgian Minister at Washington, Mr. E. H. Kellogg and Sir A. T. Galt, gave a hearing to the claims of the parties to the issue, and after considering all the evidence submitted to them, a majority decided to award the sum of $5,500,000 in gold, to be paid by the Government of the United States to the Government of Great Britain, in accordance with the provisions of the Washington Treaty. Mr. Kellogg, however, on the part of the United States, dissented from the award.

However, the Americans had no other alternative open to them than to pay the money and carry out the provisions of the Washington Treaty. The arrangement was advantageous to both countries, since it set at rest a vexatious question and stimulated commercial intercourse between them. *The American Government* gave due notice of the repeal of the treaty after it had been in existence for twelve years. Consequently it expired in July, 1885, and the treaty of 1818 should have once more immediately governed the relations of the two nations. It was not thought advisable, however, by either the Canadian or the Imperial Government to exclude American fishermen at once from the fisheries, as many of them were already in Canadian waters when the treaty came to an end, and had they been seized without

full notice having been previously given them, a serious feeling might have arisen between the countries immediately interested. After considerable correspondence between the respective Governments of London, Ottawa and Washington, *it was agreed that steps should be taken at the earliest date possible for the appointment of a joint Commission "charged with the consideration and settlement, upon a just, equitable and honorable basis, of the entire question of the fishing rights of the two Governments and their respective citizens on the coasts of the United States and of British North America.*" Accordingly, during the past season American fishermen freely frequented the waters of the Dominion. However, Canada had no other course open to her in this perplexing dilemma, involving such important international considerations, than to agree to the temporary arrangement in question, with the hope that the difficulty would be satisfactorily settled in the way proposed. It is pleasant to find that President Cleveland is evidently desirous of arriving at a just and honorable solution of the question as soon as possible. In his message to Congress in December last, he expresses his opinion that "in the interest of good neighborhood and of the commercial intercourse of adjacent communities, the question of the North American fisheries is one of large importance." After recommending that Congress provide for the appointment of a Commission, he proceeds to say: "The fishing interests being intimately related to other general questions dependent upon contiguity, consideration thereof, in all their equities, might also properly come within the province of such a Commission, and the fullest latitude of expression on both sides should be permitted."

It is obviously injurious to all sides that these international issues should be of constant occurrence, when it has always been possible to settle them for a long term of years, if not for all time. The Canadians have always felt—and President Cleveland apparently felt the same way—that the fishery question is intimately connected with the commercial relations of the two countries, and that it should be arranged in the shape of a new Reciprocity Treaty like that of 1854.

It would therefore appear that the claim made by Canada that the United States are now entitled to such rights as were given them under the treaty of 1818, and to no others, is not without some foundation. It appears that every treaty subsequent to that of 1818, has been rescinded *by the United States.* These different treaties were but *temporary* relaxations or modifications of the treaty of 1818 and intended so to be when agreed to, and with all of them annulled there must be a recurrence to that of 1818 where it is

claimed by Canada *all rights theretofore enjoyed or claimed by the United States were renounced*, and it was then agreed that the treaty of 1818 should and did specifically settle all the rights and privileges which the United States were to have in Canadian waters. In the first section of that treaty the United States "*renounce forever* any liberty *heretofore* enjoyed or claimed by the inhabitants thereof to take, dry or cure fish *on* or *within* three marine miles of any of the coasts, bays, creeks or harbours" of the British dominions in America. After the provision whereby the Americans renounced all the rights and liberties aforesaid, it was provided that American fishermen were to be permitted "to enter such bays and harbours for the purpose of shelter and repairing damages therein, of purchasing wood, of obtaining water, *and for no other purposes whatever*." Applying the rule as laid down by Wheaton and Kent, two American jurists of great learning and repute, the United States will be shut out from the most prolific fishing grounds in the world. It must, however, be admitted that the legal authorities cited are almost beyond question. They are quite in accord with the English judicial decisions on the same subject.

Under the provision relating to the circumstances under which American fishermen may enter Canadian ports, those fishing vessels which have *entered for bait* and have been seized therefor, were not protected by the treaty, and it would appear that the seizures were legally justifiable. It may appear to many as a harsh proceeding, but was it unduly so when it is considered that since July, 1885, when the treaty then in existence expired, *at the instigation of the United States*, the Canadian government has endeavored, without success, to effect some new treaty, while the American people, though recommended so to do by President Cleveland, have not evinced any desire to renew the old or enter into a new one? So long as matters remained as they have been since July, 1885, the Americans have certainly had all they desired. The Canadians felt undoubtedly that a few seizures would bring their neighbors to a sense of their position as a similar course did in 1877, when the United States was called upon to pay and did pay $5,500,000. The people of Canada are now, as in 1885, desirous of meeting the people of America in some fair settlement of the existing difficulties, and have expressed themselves to that effect, and it is thought and hoped that there is a similar desire among the people of the United States. Both countries have rights and both will maintain them, neither country will be driven into sacrificing those rights however much there may be of the rant of a lick-spittle class of politicians who feel that an occasional wrench of the lion's tail is a

prolific means of securing votes. With the fair-minded men who are at present at the head of the different governments, both no doubt fully appreciating the desirability of a settlement, an amicable and impartial arrangement becomes feasible, and considering the two countries at difference, almost inevitable.

Had President Cleveland's wise suggestions been followed, there would have been no cause for the trouble which has occurred, and the press would not, as now, with a few exceptions, been filled with the clamor of persons who hope to ride into office upon the prejudices aroused by misrepresentations of the facts involved.

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